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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 712

OLIN R. STONE, ET AL., PETITIONERS

v.

DANUBE MCFARLIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App., pp. 31–36) is reported at 249 F. 2d 54.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1957. A timely petition for rehearing was denied on November 29, 1957. The petition for a writ of certiorari was filed January 7, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the courts below correctly held under Oklahoma law that land accreted on a nonnavigable stream belongs to the owner of the riparian parcel to which it accreted.

STATUTES INVOLVED

Title 60, section 335, Oklahoma Statutes, 1951, defining the riparian right to accretions, and Title 75, section 1, Oklahoma Statutes, 1951, the enactment section containing certain limitational provisions, are printed in the petition at pages 4–5.

STATEMENT

Plaintiffs McFarlin, respondents herein, brought this action in the federal district court to quiet title to certain lands accreted to the north bank of the Salt Fork branch of the Arkansas River in western Oklahoma. The McFarlins hold a fee title to the uplands lying north of the Salt Fork branch and contiguous to the accreted land. McFarlins' claim to the accreted land was opposed by defendants Stone, petitioners herein, who held fee title to the lands lying south of the stream, and opposite the accreted land. The Government's interest in the case is as respondent on behalf of a restricted Indian, Rosalind No Ear, who holds a one-half interest in the mineral rights in the McFarlins' land.

The material facts, over which there is little controversy, are summarized as follows:

A government plot and survey of this area was filed in 1872. It showed Lots 7 and 9 of Section 30, Township 25 North, Range 1 East, to be riparian to, and located respectively on, the south and north banks of the Salt Fork branch, a nonnavigable stream at this point. Lot 7 was patented to a Ponca Indian in 1895, to whose interest petitioners have succeeded. Lot 9, on the other hand, was patented

to Rosalind No Ear in 1906, and to her interest respondents McFarlin have succeeded subject to the one-half mineral reservation in No Ear. Dave Morgan, and others, doing business as Dave Morgan Oil Company, hold an oil and gas lease on Lot 9.

Since the original survey, the stream has shifted in a southeasterly direction, gradually reducing petitioners' land by the process of erosion. Contemporaneously, respondents' land on the north bank has been gradually increased by deposits of earth accreted thereto by the natural processes of the stream. The trial court found these deposits to have been imperceptibly formed by accretion and not by a sudden change in the course of the river, *i. e.*, by avulsion. By 1956 this process had continued to the extent that only a small portion of Lot 7 remained south of the stream. Some 9.83 acres of accreted land, now on the north bank of the stream, are located geographically where part of Lot 7 had been in 1872.

Upon these facts the trial court held that the area in dispute constituted accreted lands, naturally formed, and belonging to the owner of the upland, Lot 9, because of its riparian position on the north bank. The trial court cited Title 60, section 335, Oklahoma Statutes, 1951, as declarative of the common law principle of accretion and dispositive of the issue of title to the accreted lands involved herein. The Court of Appeals affirmed, unanimously, holding that under well-established principles of common law as adopted by Title 60, section 335, *supra*, the accreted land belonged to the owner riparian thereto; that cases

cited by defendants were not controlling on the facts presented; and that the limiting provisions of Title 75, section 1, Okla. Stat., 1951, were inapplicable to the instant case.

ARGUMENT

1. The decision of the courts below quieting title to the accreted lands in the riparian owner contiguous thereto is clearly correct and does not involve any conflict with the decisions of this Court, the courts of appeals, or local state courts. It is well settled in common law that where a patent is bounded by a meander line of a stream, in the absence of avulsion, the stream remains the boundary no matter where it may shift. *Railroad Co.* v. *Schurmeir,* 7 Wall. 272; *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178. Where land is added by accretion it belongs to the owner riparian thereto. *St. Louis* v. *Rutz,* 138 U. S. 226; *Jones* v. *Johnston,* 18 How. 150; *New Orleans* v. *United States,* 10 Pet. 662; *Chase* v. *Cheatham,* 194 Okla. 1, 146 P. 2d 585; *Goins* v. *Merryman,* 183 Okla. 155, 80 P. 2d 268.

Decisions dealing with comparable fact situations support the holding below. *State* v. *Warden,* 200 Okla. 613, 198 P. 2d 402; *Bryant* v. *Chicago Mill & Lumber Co.,* 216 F. 2d 727 (C. A. 8); and *Anderson-Tully Co.* v. *Tingle,* 166 F. 2d 224 (C. A. 5). In each of those cases, the claimant was riparian on the bank opposite the accretions; and in denying each such claim the decisions represent complete unanimity in state as well as federal courts on the principle that

accretions belong to the *adjoining* riparian owner. In not one instance have petitioners shown a conflict of authority on the rule followed by the lower courts on the facts presented.

2. Petitioners further contend that the court below has incorrectly construed the pertinent statutes of the State of Oklahoma. Such a position is untenable. It is clear, from a reading of Title 75, section 1, that the purpose of the limitations therein was to prevent the very situation which petitioners are here attempting to bring about, *i. e.*, divesting an upland owner of his riparian rights, including that of accretion as set forth in the statutory adoption of the common law rule in Title 60, section 335. It would certainly be a violation of this statute to hold that, because of the accretion, the owners of Lot 9 on the north side of the river had lost their riparian position.

3. Finally, petitioners' assertion that the decision below violates their rights under the 5th and 14th Amendments is completely unfounded. In fact a rational analysis of the decision demonstrates that a contrary ruling would deprive *respondents* of certain vested rights as riparian owners, namely, the right to accretions deposited contiguous to their upland. It seems obvious that such a construction of a state statute defining riparian rights as to accretions cannot constitute a deprivation of property in violation of constitutional safeguards.

Petitioners' argument has not drawn in question the constitutionality of the state statutes cited *supra*. It has only been the interpretation and construction placed thereon by the courts below which has allegedly deprived petitioners of vested property rights. It is difficult to perceive in what manner petitioners could be deprived of vested rights contrary to constitutional guarantees by the courts' interpretation of a statute held to have been an adoption of the common law. It is apparent that petitioners possessed no vested rights to the accreted land, and, therefore, are divested of no rights by the decision of the courts below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1958.